

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 583

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION, PETITIONER

vs.

MOHAWK WRECKING AND LUMBER COMPANY, A
PARTNERSHIP, AND HARRY SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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PAUL A. PORTER VS. MOHAWK ET AL.

1

In District Court of the United States for the Eastern District of
Michigan, Southern Division

Civil Action No. 5630

IN THE MATTER OF MOHAWK WRECKING & LUMBER COMPANY,
A PARTNERSHIP, AND HARRY SMITH

PAUL A. PORTER, APPELLANT

vs.

MOHAWK WRECKING & LUMBER COMPANY, A PARTNERSHIP, AND
HARRY SMITH, APPELLEES

Notice of appeal

Filed April 19, 1946

Paul A. Porter, Administrator of the Office of Price Administration, Applicant and Appellant, hereby takes an appeal to the Circuit Court of Appeals, Sixth Circuit, from the Final Order entered herein April 16, 1946, which Order denied Appellant's Application for an Order to compel compliance with a Subpoena issued by the Office of Price Administration and which Order was entered by the Honorable Arthur A. Koscinski, District Judge.

MILTON KLEIN,
*Director Litigation Division,
Enforcement Department,
Office of Price Administration,
Washington 25, D. C.*

THERON M. HALL,
*District Enforcement Attorney,
Office of Price Administration,
600 Griswold Street, Detroit 20, Michigan,
Counsel for Appellant,*

Dated: The 19th day of April 1946.

In United States District Court

Designation of record

Filed April 19, 1946

Paul A. Porter, Administrator of the Office of Price Administration, through his counsel, hereby designates for incorporation in the record on appeal taken by him from the final order entered

in the within cause on April 16th, 1946, which Order denied appellant's application for an order to compel compliance with a subpoena issued by the Office of Price Administration, the entire record and all of the proceedings and evidence in the action.

MILTON KLEIN,
*Director Litigation Division,
 Enforcement Department,
 Office of Price Administration,
 Washington 25, D. C.*

Theron M. Hall,
*District Enforcement Attorney,
 Office of Price Administration,
 600 Griswold Street, Detroit 26, Michigan,
 Counsel for Appellant.*

The undersigned attorneys for the defendant in the above entitled cause hereby acknowledge receipt of the above designation of record.

JOHN W. BABCOCK,
Attorney for Defendant.

Dated at Detroit, Michigan, this 19th day of April A. D. 1946.

3 In United States District Court

[Title omitted.]

Application of Paul A. Porter, Administrator of the Office of Price Administration, for an order compelling compliance with a subpoena issued by the Office of Price Administration

Filed March 18, 1946

1. The applicant, Paul A. Porter, is the Price Administrator of the Office of Price Administration, duly appointed, and makes this application through his attorneys.

2. The Mohawk Wrecking and Lumber Company is a partnership consisting of Harry Smith and Harry Jaffa, and Harry Smith is one of the copartners of the said copartnership; and that the said copartnership has offices at 14525 West Chicago Boulevard in the City of Detroit, County of Wayne, and State of Michigan.

3. In the course of the investigation being conducted by the Office of Price Administration into alleged violations by the Mohawk Wrecking & Lumber Company of Maximum Price Regulation 215, Maximum Price Regulation 26, and General Maximum Price Regulation, a Subpoena duces tecum was issued to the Mo-

hawk Wrecking & Lumber Company, Harry Smith, and Harry Jaffa, a copy of which is attached hereto and marked "Exhibit A." Said Subpoena was duly served on the 9th day of January 1946, on Harry Smith, one of the copartners of the said Mohawk Wrecking & Lumber Company.

4 4. On to wit: January 11, 1946, said Harry Smith appeared in response to the said Subpoena and filed a Claim of Exemption under the Compulsory Testimony Act and requested an adjournment to enable him to assemble the records to be produced by the said Subpoena; and at his request, the matter was adjourned to January 25, 1946.

5. On January 25, 1946, neither the said Harry Smith nor any representative of the Mohawk Wrecking & Lumber Company appeared. A telephone call was received requesting adjournment until February 4, 1946, and on February 4, no appearance was made nor has any explanation of the nonappearance of Mohawk Wrecking & Lumber Company or Harry Smith been made since that date.

Wherefore, the applicant prays:

(1) That the Court issue an Order requiring the Respondents and each of them to appear at the Detroit District Office of the Office of Price Administration and to produce all records required to be produced by the Subpoena of January 11, 1946, or in the alternative, to make such records fully available for inspection by a duly authorized representative of the Office of Price Administration at their place of business.

(2) That the Applicant may have such other and further relief as the circumstances may require.

PAUL A. PORTER,
Price Administrator,
Office of Price Administration.
By THERON M. HALL,
District Enforcement Attorney.
ARTHUR J. SCHUCK,
Enforcement Attorney.

Dated: At Detroit, Michigan, this 7th day of March 1946.

5 *Exhibit A to application*

United States of America
Office of Price Administration.

SUBPOENA

TO MOHAWK WRECKING & LUMBER COMPANY.

HARRY SMITH and HARRY JAFFA.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before Arthur J.

Schuck, of the Office of Price Administration, at 600 Griswold Street, in the City of Detroit, County of Wayne, State of Michigan, on the 11th day of January, 1946, at 9 o'clock A. M. of that day, and bring with you all 1945 purchase invoices on lumber; bills of lading on lumber; all cash and charge sales invoices April 1, 1945, to December 31, 1945, inclusive; all lumber inventory records for the past 18 months.

Fail not at your peril.

In testimony whereof, the undersigned, an officer designated by the Price Administrator of the Office of Price Administration, has hereunto set his hand at Detroit, Michigan, this 9th day of January 1946.

(Sgd.) W. E. FITZGERALD.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served by the undersigned on January 9, 1946, at 2:30 P. M. to Harry Smith, copartner of the Mohawk Wrecking & Lumber Company.

(Sgd.) WAYNE H. PRICE, Investigator.

6 [Duly sworn to by Arthur J. Schuck; jurat omitted in printing.]

7 In United States District Court

[Title omitted.]

Answer of respondent to rule to show cause

Filed March 25, 1946

Now comes the above-named Mohawk Wrecking & Lumber Company, a Partnership, and the above named Harry Smith, and for Answer unto the Rule to Show Cause entered in the matter above entitled; and unto the Application therefor, according to the words and terms of the document as served upon the respondent, respectfully shows unto the Court as follows:

1. Answering paragraph 1 of the Application of the applicant respondent shows unto the Court that he has no personal knowledge of the accuracy or truth of the allegations therein contained, and no information regarding the same other than newspaper accounts, and hence, only upon information and belief admits such allegations to be true.

2. Answering paragraph 2 of said Application, respondent admits the allegations therein contained.

3. Answering paragraph 3 of said Application, respondent has no personal knowledge or means of knowledge or information upon which to form a belief regarding the reason or cause for the purported and apparent issue of a document called "subpoena duces tecum" and, therefore, neither admits nor denies such part of the allegations in paragraph 3 of said application.

8 Further answering said paragraph 3 of said allegation, respondent denies that "a subpoena duces tecum was issued to the Mohawk Wrecking and Lumber Company, Harry Smith and Harry Jaffa," and denies that a "subpoena was duly served on the 9th day of January 1946, on Harry Smith, one of the co-partners of the Mohawk Wrecking and Lumber Company."

Further answering the allegations of said paragraph 3 in said application, respondent admits that a document similar in form and substance to the copy of a document apparently attached to said Application was handed to Respondent Harry Smith on or about the 9th day of January A. D. 1946, but denies that said document is in any sense a subpoena within the intent and meaning of any of the laws of the United States.

4. Answering paragraph 4 of said Application, respondent admits that on the 11th day of January A. D. 1946, the said respondent Harry Smith appeared at the Office of Price Administration at 600 Griswold Street, Detroit, Michigan, and at such time and place delivered to Mr. Arthur J. Schuck in writing, his claim that the testimony requested of him and the production of the records requested of him, if insisted upon, would amount to compelling him to give testimony against himself and to act as a witness against himself, and amount to compelling self-incrimination, and that if the giving of such testimony and the surrender of such records were insisted upon, the immunity provisions of the Compulsory Testimony Act of February 11, 1893, should apply with respect to the said undersigned, all of which and further in the nature of the claim then made by respondent, will appear by copy of such document attached hereto, marked "Exhibit A," and made a part hereof.

Further answering said paragraph 4 of said Application, respondent admits that on this occasion he advised the said Arthur J. Schuck that he would need further time to gather together and have available any of the books and records of his business such as purported to be described in the document called "subpoena duces tecum" which had been delivered to him, the said respondent, and that thereupon it was agreed that any

further hearing or discussion of the matter would be adjourned or continued until the 24th day of January 1946.]

5. Answering paragraph 5 of said Application, respondent admits that on January 25, 1946, neither respondent nor anyone in his behalf, made a physical appearance at the Office of Price Administration, but further answering said paragraph shows unto the Court that such nonappearance was the result of an agreed arrangement made between Arthur J. Schuck and respondent's attorney that said matter would be continued, and adjourned until the 4th day of February 1946.

Further answering said paragraph 5, respondent admits that on the 4th day of February 1946, he did not appear at the Office of Price Administration, but denies that no "explanation of the nonappearance" has been made since that date, and further answering said allegation in said paragraph 5, shows unto the Court that on the 1st day of February 1946, respondent's attorney wrote and mailed to the Office of Price Administration a letter of explanation, a copy of which is attached hereto, marked "Exhibit B," and made a part of this Answer.

Further answering said application, respondent insists that there is no provision in law by which any authority can compel by subpoena a partnership to make any appearance, produce any records, or give any testimony; that a partnership is not an entity separate and distinct from the individual persons who compose it, and that any process, orders, directives, or requirements must be imposed or served upon individual persons; and that as indicated by the complete record in this matter, there has been upon the part of these respondents neither a valid, lawful and proper subpoena issued and served, nor any evidence of contumacy or refusal to obey any subpoena of the Price Administrator of the Office of Price Administration, and that this Court is without jurisdiction to enter the Order requested by the Applicant, or any other Order upon the showing made in the matter pending before the Court and, therefore, respondents respectfully move that the said proceedings may be dismissed and the respondents discharged therefrom.

Dated at Detroit, Michigan, this 22nd day of March A. D. 1946.

MOHAWK WRECKING & LUMBER COMPANY,

HARRY SMITH,

By BROWN, FENLON & BABCOCK,

Their Attorneys.

By JOHN W. BABCOCK.

*Exhibit A to answer*DETROIT, MICHIGAN, *January 11, 1946.*

PRICE ADMINISTRATOR,

Office of Price Administration, Detroit, Michigan.

Attention: W. E. Fitzgerald, Arthur J. Schuck, Enforcement Attorney.

The undersigned hereby appears at your office in response to your subpoena duces tecum dated January 9, 1946, and assures you of his availability in response to your subpoena. You will please be advised, however, that the undersigned claims that the testimony requested in said subpoena, if insisted upon, shall amount to compelling the undersigned to give testimony against himself, and to act as a witness against himself, and amounts to compelling self-incrimination, and that if the giving of
11 such testimony and the surrender to you for examination of such records is insisted upon, then the immunity provisions of the Compulsory Testimony Act of February 11, 1933, shall apply with respect to the undersigned, and the undersigned claims and will claim that thereafter he shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, item, information, fact, data, or thing which may be included within, evolved from, developed from, suggested by, or established by any of such testimony so insisted upon, or any of the transactions, facts, information, things, or data included within or taken from such records, and/or concerning which the undersigned may testify or produce evidence, documentary or otherwise, all by reason of the provisions of the Constitution of the United States and of the Acts of Congress in such case made and provided:

The foregoing expression of availability on the part of the undersigned must not be construed as a waiver upon the part of the undersigned to object to the validity or the legal effect and force of any subpoena signed by any one other than the Price Administrator of the Office of Price Administration nor construed as an admission that the undersigned can testify or can bring and produce the records as directed in said subpoena.

HARRY SMITH.

Exhibit B to answer.

LAW OFFICES

BROWN, FENLON & BABCOCK

Prentiss M. Brown. Brown, Fenlon, Lund & Babcock.
 Edward H. Fenlon. Washington, D. C.
 John W. Babcock. Wendell Lund, Resident Partner.
 David A. Goldman. A. Manning Shaw, Business Consultant.

PENOBSCOT BUILDING,
 DETROIT 26, MICHIGAN,

February 1, 1946.

OFFICE OF PRICE ADMINISTRATION,
 600 Griswold Street, Detroit 26, Michigan.
 Attention. Mr. W. E. Fitzgerald, District Director.

Re: Mohawk Wrecking & Lumber Company. Harry Smith and
 Harry Jaffa

GENTLEMEN: I am addressing this communication to you with particular references to the subpoena duces tecum apparently issued out of your office January 9, 1946, and directing appearance before Arthur J. Schuck on January 11th at 9:00 o'clock in the forenoon. This subpoena was served upon Mr. Harry Smith and in response thereto he did appear before Mr. Schuck on January 11th as directed. The matter was then adjourned by agreement until January 25th to allow Mr. Smith to check into the matter of getting together the documentary evidence described in the subpoena. Between January 11th and January 25th, it was necessary for Mr. Harry Smith to make a business trip to the State of Washington and transportation difficulties prevented his return to Detroit in time for a second appearance at your office on January 25th. This advice was given by 'phone to your Mr. Schuck and he agreed if we would set forth these circumstances in a letter addressed to you, the hearing would be further continued until February 4th.

As far as Mr. Harry Smith is concerned, you will please be advised that he has no intention or desire to disobey, or to refuse to obey, any proper subpoena served upon him, or to be guilty of contumacy in connection therewith, or in connection with any other proper order or directive of any lawful Government official. There are, however, two or three features about the initiation of the proceedings apparently indicated by the subpoena above mentioned, which Messrs. Smith and Jaffa desire to bring to your attention, and concerning which they desire to make a formal record. The first of these is that Messrs. Smith and Jaffa have

grave doubts about your authority as District Director to issue a subpoena in view of the fact that the Act of Congress in question directs that the Administrator may, by subpoena, require and person engaged in the business of dealing with any commodity, to appear and testify, or to appear and produce documents, or both. If, however, you can direct our attention to any order issued by the Administrator conferring specific authority to issue subpoena upon the District Director, we shall be glad to give consideration to the legal effect of such order.

In addition to this question, however, if you did not know it before, this will advise you, that Messrs. Smith and Jaffa are partners in the conduct of the business of the Mohawk Wrecking and Lumber Company. It is our opinion that where a business is operated and conducted by a partnership, there are well defined immunity rights inherent to citizenship of the United States and possessed by individuals in this conduct of their business as individuals, or in the conduct of a business as partners, and that

14 such immunity rights can be invaded by representatives of the Government of the United States only when appropriate provision is made for the protection of the individual citizen. Thus, the very Act of Congress under the authority of which your subpoena was issued, expressly provides that "the immunity provisions of the Compulsory Testimony Act of February 11, 1893, shall apply with respect to any individual who specifically claims such privilege."

It appears to us rather fundamental that before any action is taken to require the production of books, records and documents of individual persons engaged in business, each and all of such persons should be extended the opportunity to claim the privilege provided by law. It seems to us also, that the question of their making claim to such privilege should not be imposed upon them unless and until they have first had the benefit and the courtesy of service upon them individually, of any subpoena with which compliance is requested. In other words, to be more specific, regardless of the service upon Mr. Smith of your subpoena, Mr. Harry Jaffa ought not to be placed in a position potentially dangerous by volunteering to subject himself to the consequences of a matter in which he has not been made a party by the service upon him of appropriate process or directive.

With the purpose in mind of making a record of the position of these gentlemen, and of indicating the conditions which we feel they have a right to insist upon, before it can be said that they have been guilty of contumacy or refusal to obey your subpoena, if it is still your desire to have produced the items described in your subpoena of January 9th, we respectfully request that a valid and proper subpoena be served upon each and both of said partners and

that each and both of them be extended the opportunity to claim his privilege under the Constitution and the Acts of Congress before there be required the production of any books, records and documents of the Mohawk Wrecking Company. It so happens that at the present time the business of the Mohawk Wrecking Company has Mr. Jaffa at Richland, in the State of Washington. In order that no one may feel we are merely trying to postpone this matter, we suggest to you that if you desire to proceed with this matter and if you will have a proper subpoena served upon Mr. Jaffa, and thereafter extend to him the opportunity to file his claim of privilege in writing, we will not insist upon his personal appearance before your Mr. Schuck prior to arranging for Mr. Smith to turn over to your representatives the items described in your subpoena. In view of this position and of the suggestions which we have made herein, Mr. Smith will not appear at your office on February 4th, but will hold himself available for such further conferences as our further negotiations may develop to insure mutually the rights of these two citizens as well as the rights and obligations of the United States Government.

Respectfully yours,

BROWN, FENLON & BABCOCK.
By JOHN W. BABCOCK.

JWB:ml.

16

In United States District Court

[Title omitted.]

Affidavit of John W. Babcock

STATE OF MICHIGAN,

County of Wayne, ss:

John W. Babcock, being duly sworn, deposes and says that he is an attorney-at-law, duly admitted to practice in the Courts of the State of Michigan and before The United States District Court for the Eastern District of Michigan.

Deponent further says that in such capacity he has been representing and advising the Mohawk Wrecking and Lumber Company and Mr. Harry Smith in connection with business problems of said client.

Deponent further says that on or about the 23rd day of January A. D. 1946, he had a telephone conversation with Mr. Arthur J. Schuck of the Office of Price Administration, during which deponent advised said Arthur J. Schuck that important business had taken Mr. Harry Smith to the State of Washington and that deponent had been informed that Mr. Harry Smith was experienc-

ing difficulty in procuring transportation back to Detroit and would be unable to return to the City of Detroit in time to make an appearance in the Office of Price Administration on the 25th day of January 1946.

17 Deponent further says that thereupon it was agreed between deponent and said Arthur J. Schuck that further conference and hearing relative to the matter of the Mohawk Wrecking and Lumber Company would be continued and adjourned until the fourth day of February 1946.

Deponent further says that thereafter deponent gave further study and thought to the questions and principles of law involved in the matter of administrative process issued by the Office of Price Administration, particularly as it applied to the affairs of the Mohawk Wrecking and Lumber Company, and that on the first day of February 1946, deponent dictated, had transcribed and caused to be mailed in the normal use of the United States Mails, a letter addressed to Office of Price Administration, a copy of which is attached to the respondent's Answer in the matter above entitled, and marked "Exhibit B."

Deponent further says that he has had neither communication nor telephone call from anyone representing the Office of Price Administration relative to the matters of the Mohawk Wrecking and Lumber Company since the mailing of said letter of February 1, 1946, until the delivery to deponent by his client of the copy of Order to Show Cause and Application to which answer is herewith being made.

Further deponent says not.

JOHN W. BARCOCK.

Subscribed and sworn to before me, this 22nd day of March A. D. 1946.

MARGARET M. LOOK.

Notary Public, Wayne County, Michigan.

My commission expires October 11, 1949.

18

In United States District Court.

[Title omitted.]

Opinion denying application for order compelling compliance with subpoena duces tecum

Filed April 12, 1946

The Office of Price Administration issued a subpoena duces tecum directed to Mohawk Wrecking and Lumber Company, Harry

Smith and Harry Jaffa requiring them to appear before Arthur J. Schuck of the Office of Price Administration at 600 Griswold Street in the City of Detroit on the 11th day of January 1946, with certain business records therein described. The subpoena is tested as follows:

"In testimony whereof, the undersigned, an officer designated by Price Administrator of the Office of Price Administration, has hereunto set his hand at Detroit, Michigan, this 9th day of January 1946.

(Sgd.) W. E. FITZGERALD.

Return of service indicates that the subpoena was served on January 9, 1946, on Harry Smith—copartner of the Mohawk Wrecking and Lumber Company.

Under date of March 18, 1946, the Price Administrator, through his attorney, filed application in this court for an order compelling compliance with the subpoena so issued:

19 The respondents, in their answer to the Administrator's application, challenge the Administrator's authority to delegate the power of issuing subpoenas to a subordinate, and this court's jurisdiction to enter the order requested.

Under 50 U. S. C. A. App. (922-b) the Administrator is authorized to "whenever necessary, by subpoena require any such person to appear and testify or to appear and produce documents, or both, at any designated place."

For validity of delegated power of subpoena applicant relies on 50 U. S. C. A. App. 921 (b), which provides:

"(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place."

In Cudahy Packing Co. v. Holland, 315, U. S. 357, the Court had before it precisely the same question under the fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. Sec. 201 (29 U. S. C. A. Sec. 901 et seq.)—the authority of the Administrator of the Wage and Hour Division of the Department of Labor to delegate his statutory power to sign and issue a subpoena tecum.

The force of authority claimed for delegation of the subpoena power in the Cudahy case was Section 4 (c), 29 U. S. C. A. Sec. 204 (c), which is as follows:

"(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place."

This clause is nearly identical with 50 U. S. C. A. App. Sec. 921 (b) of the Emergency Price Control Act of 1942. In construing

the meaning of that clause the Court said in the Cudahy case (p. 360) :

"On its face this seems no more than a definition of the geographical or territorial jurisdiction of the Administrator and his representatives."

20 The subpoena power under the Fair Labor Standards Act is found in 50 U. S. C. A. App. Section 209, which makes Sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents) applicable to the jurisdiction, powers, and duties of the Administrator. The relevant provision of the Federal Trade Commission Act referred to is Section 49 and provides:

"And the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence."

The members of the Commission were specifically designated to sign subpoenas and though under Section 43 of that Act the Commission was authorized to exercise its powers through examiners appointed by it, "in any part of the United States," the power of subpoena was not granted to such examiners.

After reviewing Congressional legislation in which power of subpoena was either expressly granted or withheld by Congress, Chief Justice Stone said (p. 336 of Cudahy case) :-

"All this is persuasive of a Congressional purpose that the subpoena power shall be delegatable only when an authority to delegate is expressly granted."

Unless, therefore, there are features in this case distinguishing it from the ruling made in the Cudahy case, the same rule must here be applied.

It is argued on behalf of the Administrator that the Emergency Price Control Act of 1942 under which this application is made has been specifically labeled by Congress as an "emergency"

21 law and that the Administrator is charged with carrying out the purposes of the Act as expressed by Congress with the least possible delay to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other destructive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency, and further to prevent undue impairment of the national standard of living; to prevent hardship which would result from abnormal increases in prices, and to prevent the post emergency collapse of values—

all as expressed in Section 901 of the Act; that the authority to conduct hearings under Section 922 would be unduly curbed and delayed if the right to conduct such investigations and hearings were dependent or conditioned on obtaining subpoena signed by the Price Administrator; that being an emergency Act the law is one of temporary duration and that in that respect it differs from the Fair Labor Standards Act which is a permanent piece of legislation and not passed as an emergency measure, and that, furthermore, in the adoption of the Fair Labor Standards Act Congress specifically struck out the clause delegating the subpoena power to a subordinate and that such an intention on the part of Congress does not appear in the adoption of the Emergency Price Control Act; that, therefore, under Section 921 (b) Congress intended to grant authority to the Price Administrator for delegation of the subpoena power.

These arguments might under other circumstances be persuasive. But the language of the Cudahy case compels a denial here of the Administrator's assumed authority to delegate the power of subpoena.

To quote further from the opinion in that case:

(p. 363):

"Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

22 (p. 364):

"The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power. The Interstate Commerce Act, the National Labor Relations Act, and the Federal Trade Commission Act, whose subpoena provisions were adopted by the present Act and by the Packers and Stockyards Act, all fail to grant authority to delegate the issuance of subpoenas. It appears that none of the agencies administering these acts has construed the authority of its head to include the power to delegate the signing and issuance of subpoenas. On the other hand, Congress, in numerous cases, has specifically authorized the delegation of the subpoena power. In others it has granted the power to particularly designated subordinate officers or agents, thus negating any implied power in the head to delegate generally to subordinates."

To the Administrator's argument that his application is made under an "emergency" law and that therefore any action taken by

him under that law should not be unduly delayed, it is enough to say that the subpoena in question here was served on January 9, 1946, but it was not until March 18, 1946, that application was made to this court for compelling obedience to it. There was no such emergency here as claimed by the Administrator to necessitate speed in the proceedings. A subpoena signed by the Price Administrator himself could have been obtained and served with less delay.

This court, therefore, being without jurisdiction in the matter, the application of the Price Administrator is denied.

In view of this ruling other questions raised by the pleadings need not be passed upon in this proceeding.

ARTHUR A. KOSCINSKI,
U. S. District Judge.

In United States District Court

[Title omitted.]

Order denying application for order compelling compliance with subpoena

Entered April 16, 1946

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 16th day of April A. D. 1946.

Present: Honorable ARTHUR F. KOSCINSKI, U. S. District Judge.

In the above-entitled matter Enforcement Attorneys for the Honorable Paul A. Porter, Price Administrator, Office of Price Administration, having presented an Application for an Order requiring obedience to an alleged administrative subpoena, and the respondents having filed their Answer to said Application denying the validity of said subpoena and the jurisdiction of this Court to enter the Order applied for, the matter having been heard in open Court and argued by counsel for the respective parties, and the Court having taken the matter under advisement and duly considered all of the issues involved in the premises, now, therefore,

It is ordered and adjudged that said Application be and the same hereby is dismissed and denied.

ARTHUR A. KOSCINSKI,
U. S. District Judge.

24 [Clerk's certificate to foregoing paper omitted in printing.]

In United States District Court

Stipulation re comparison of record

Filed May 10, 1946

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

MILTON KLEIN,
Director Litigation Division,
Enforcement Department,
Office of Price Administration,
Washington 25, D. C.

THURON M. HALL,
District Enforcement Attorney,
Office of Price Administration,
600 Griswold Street, Detroit 26, Michigan,
Counsel for Appellant.

JOHN W. BABCOCK,
Attorney-at-Law,
Penobscot Building, Detroit 26, Michigan,
Counsel for Appellee.

Dated at Detroit, Michigan, this 10 day of May, 1946.

25 [Clerk's certificate to foregoing transcript omitted in
printing.]

26 In United States Circuit Court of Appeals, Sixth Circuit

Cause argued and submitted

June 1, 1946

Before: SIMONS, ALLEN, and MILLER, JJ.

This cause is argued by Samuel Mermin for Appellant and by John W. Babcock for Appellee and is submitted to the court.

In United States Circuit Court of Appeals

Judgment

Entered August 12, 1946

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

United States Circuit Court of Appeals, Sixth Circuit

No. 10254

PAUL PORTER, PRICE ADMINISTRATOR, APPELLANT

v.

MOHAWK WRECKING & LUMBER COMPANY, A PARTNERSHIP, AND
HARRY SMITH, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division

Opinion

Filed August 12, 1946

Before SIMONS, ALLEN, and MILLER, Circuit Judges.

MILLER, Circuit Judge. This appeal by the Price Administrator of the Office of Price Administration is from an order of the District Court denying an application under § 202 (e) of the
27 Emergency Price Control Act for an order compelling compliance with a subpoena. § 922 (e) Title 50 App. U. S. C. A.

In the course of an investigation being conducted by the Office of Price Administration into alleged violations by the appellee, Mohawk Wrecking and Lumber Company, of MPR 215, MPR 26, and GMPR, a document purporting to be an administrative subpoena, duces tecum was issued on January 9, 1946 to said Company and the copartners thereof, Harry Smith and Harry Jaffa. It was served on Harry Smith on January 9, 1946, and by its terms directed him to appear before Arthur J. Schuck of the Office of Price Administration in Detroit, Michigan, on January 11, 1946, and to bring with him certain documents designated therein. The designated hearing was adjourned by agreement first to January 25, 1946, and then to February 4, 1946, on which later date no appearance was made by Mohawk Wrecking & Lumber Company or by Harry Smith. The subpoena in question was executed as follows:

"In testimony whereof, the undersigned, an officer designated by the Price Administrator of the Office of Price Administration,

has hereunto set his hand at Detroit, Michigan, this 9th day of January 1946.

(Sgd.) W. E. FITZGERALD."

W. E. Fitzgerald (who signed the subpoena, was the District Director of the Office of Price Administration, authorized to sign subpoenas by the Administrator's Revised Order 53 issued on May 13, 1944 (9 FR 5191).

On March 7, 1946, the Administrator, through his district enforcement attorney, applied for an order in the District Court under § 202 (e) of the Act requiring the respondents to appear at the Detroit office of the Office of Price Administration and to produce all records required to be produced by the previously issued subpoena. The application was denied by the District Judge on the ground that there was no authority under the Price Control Act for the Administrator's delegation to the district director of the authority to sign and issue subpoenas. Other issues presented by the pleadings were not passed upon and are not involved in this appeal.

The Emergency Price Control Act, by § 202 (a) [§ 922 (a) Title 50 App. U. S. C. A.], authorizes the Administrator to make such studies and investigations as he deems necessary to assist him in prescribing any regulation or order under the Act. § 202 (c) of the Act [§ 922 (c) Title 50 App. U. S. C. A.], provides—
 "For the purpose of obtaining any information under subsection a, the Administrator may by subpoena require any other person to appear and testify or to appear and produce documents, or both, at any designated place." The appellant claims that his authority to delegate to regional and district directors the power to issue subpoenas is conferred by the following provisions of § 201 of the Act. § 201 (a) [§ 921 (a) Title 50 App. U. S. C. A.], provides in part as follows:

"The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, * * *

§ 201 (b) [§ 921 (b) Title 50 App. U. S. C. A.], provides in part as follows:

"The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place."

§ 201 (d) [§ 921 (d) Title 50 App. U. S. C. A.], provides as follows:

"The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

The District Judge was of the opinion that his ruling was controlled by the opinion of the Supreme Court in *Cudahy Packing*

Company v. Holland; 315 U. S. 357, where the Supreme Court had before it precisely the same question under the Fair Labor Standards Act, involving the authority of the Administrator of the Wage and Hour Division of the Department of Labor to delegate his statutory power to sign and issue a subpoena duces tecum. In that case the Supreme Court held that the Administrator did not have the authority to delegate such power to a regional director of the Wage and Hour Division. Appellant contends that the present case, arising under the Emergency Price Control Act instead of under the Fair Labor Standards Act, involves sufficient differentiating features to make that ruling inapplicable.

A consideration of the wording of the statutory provisions involved in the Cudahy case and of the broad scope of the principles announced by the opinion in that case shows how closely in point is the ruling of that case. The Fair Labor Standards Act contains in almost identical language the same provisions as are quoted above from §§ 201 (a) and 201 (b) of the Emergency Price Control Act. The Administrator of the Wage and Hour Division under the Fair Labor Standards Act is given authority to issue orders containing such terms and conditions as he finds necessary to carry out the purposes of such orders and to prevent the circumvention or evasion thereof, similar to the authority given to the Price Administrator, although the wording in the Fair Labor Standards Act is somewhat different from the wording of § 201 (d) of the Emergency Price Control Act quoted hereinabove. The Supreme Court held that such provisions in 29 the Fair Labor Standards Act, two of them being practically identical in wording with the provisions in the Emergency Price Control Act herein relied upon by the Price Administrator, did not confer upon the Administrator the authority to delegate his power to issue subpoenas, in that the power to so delegate was not expressly granted. It based its ruling upon a broad general rule of administrative law that the subpoena power can not be delegated by implication and that the right to delegate exists only when the authority to so delegate is expressly granted. In reviewing the statutes creating numerous administrative agencies, including the Interstate Commerce Act, the National Labor Relations Act, the Federal Trade Commission Act, the Packers and Stockyards Act, Veterans Administration Act, Railroad Unemployment Insurance Act, Walsh-Healey Act, Merchant Marine Act, Federal Power Act, Securities Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Act, Communications Act, Bureau of Marine Inspection and Navigation Act, Civil Aeronautics Act of 1938, Motor Carrier Act and Longshoremen's and Harbor Workers' Comp. Act, the Court

summed up the rule of administrative law flowing from such legislation as follows:

"The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power." (Page 364.)

Further considering the same question, the Court repeated the rule in the following language:

"All this is persuasive of a Congressional purpose that the subpoena power shall be delegable only when an authority to delegate is expressly granted."

That such is the real basis of the ruling is made clear by the dissenting opinion in the case, which is devoted almost entirely to a vigorous dissent to such a principle of administrative law.

The Administrator's contention in the present case that the foregoing rule is not applicable because his authority to delegate the subpoena power is expressly conferred by the provisions of the Emergency Price Control Act set out hereinabove is directly contrary to the ruling of the Supreme Court in the Cudahy case that such provisions, practically identical in wording, did not expressly delegate such authority to the Administrator. Accordingly, unless the rule announced in the Cudahy case is to be set aside or modified, or unless distinguishing features in this case make it inapplicable, the Price Administrator lacked the claimed authority to delegate the subpoena power to the district director who issued the subpoena herein involved.

The Administrator contends, however, that the decision in the Cudahy case was based on the legislative history leading to
30 the enactment of the Fair Labor Standards Act, rather than the rule above referred to. He points out that Congress in finally enacting that legislation rejected the wording of the bill passed by the Senate which expressly authorized the Administrator to delegate the subpoena power and adopted instead the wording quoted hereinabove. It is urged that the legislative history of the Emergency Price Control Act is entirely different, in that it does not involve any such choice between conflicting provisions dealing with the subpoena power, but on the contrary shows that the Senate Committee on Banking and Currency in reporting out the Price Control Bill stated that §§ 201 (a) and 201 (b) of the Act authorized the Administrator to delegate any of the powers given to him by the bill. We believe the Administrator is in error in assuming that the Court's decision in the Cudahy case was based upon the legislative history of the Fair Labor Standards Act. The Court said that if the Act was construed so as to authorize the delegation of the subpoena power by implication it would result in giving the Administrator unrestricted authority to delegate

every other power which he possessed. Well considering the effect of such a construction, the Court ruled as it did with the following statement:

"A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words." (Page 361.)

It is true that the Court stated a few sentences thereafter that—"This construction is fully supported by the legislative history of § 4 (c)." This legislative history is then set out in a footnote instead of in the body of the opinion. It would thus seem that the legislative history was merely a supporting reason, rather than a primary reason, for the ruling by the Court. The fact that such legislative history does not exist in the present case in no way destroys the applicability of the primary reason upon which the Court's decision was really based. In this connection it is interesting to note that the dissenting opinion in the Cudahy case concedes that the case was not decided on the basis of its legislative history, in its statement that "There is no indication whatsoever that the choice of the House bill as against the Senate bill was in any way influenced by the presence in the latter of an express power of the proposed Board to delegate its subpoena power." (P. 371, 372.) Its attack on the majority opinion is directed against the ruling that the subpoena power cannot be impliedly delegated, clearly showing the interpretation it gave to the ruling.

31 The report of the Senate Committee on Banking and Currency in reporting out the Price Control Bill is entitled to consideration, but in view of the general language used therein and the fact that it is the report of only one of the two houses of Congress makes it merely one element to be considered among several and certainly not controlling. The report largely paraphrases §§ 201 (a) and 201 (b) of the Act, refers to the "powers" of the Administrator only generally, and, as is the case in the wording of the Act itself, makes no specific mention of the subpoena power. In any event, the view of the Senate Committee as to the legal effect of the words used in the Act is directly contrary to the later view of the Supreme Court in the Cudahy case. The construction placed upon those words by the Supreme Court came only a few weeks after the enactment of the Emergency Price Control Act. Yet in the several reenactments of the Act in subsequent years, neither the Senate Committee on Banking and Currency nor Congress itself added anything to the statute to show that Congress, in passing the Act, had in mind an interpretation different from that given by the Supreme Court.

The Administrator contends that the Emergency Price Control Act was administratively construed from the outset to permit the delegation of the power to issue subpoenas and that the action of Congress in subsequently reenacting the Act on June 30, 1944, and June 30, 1945, should be regarded as legislative ratification of the administrative construction. A review of the administration and enforcement of the Act since its original enactment on January 30, 1942, shows that the Act was not administratively construed from the outset to permit such delegation. It appears that a memorandum by the assistant general counsel for the Administrator was issued on March 26, 1942, construing the Act to permit such a delegation. However, the Administrator did not at that time act upon that opinion. The Administrator continued to sign and issue all subpoenas. On June 29, 1943, General Order 53 (8 FR 9037) was issued, delegating the authority to regional administrators and district directors to issue subpoenas which had been signed in blank by the Administrator. Finally, on May 13, 1944, revised Order 53 (9 FR 5191) was issued which delegated the functions of both signing and issuing subpoenas under the Price Control Act to regional administrators and district directors. Such administrative practice and the testimony of Mr. Fleming James, Jr., Director of the Litigation Division, Office of Price Administration, before the House of Representatives Committee to Investigate Executive Agencies on June 22, 1944, makes it clear that, in spite of the Administrator's present contention and confident argument in support thereof, there was a period of some two years during which real doubt existed in the Office of Price Administration of the Administrator's authority to delegate the subpoena power. The doubtful validity of delegating such authority caused the Administrator to refrain from its exercise for a period of more than two years, during which time no attempt was made to have Congress clarify the situation by amendatory legislation. If the Administrator really believed that it was the intention of Congress in enacting the Emergency Price Control Act to authorize him to delegate such power, it would seem that he would have exercised such power immediately or sought clarifying amendments to remove any existing doubt. Apparently, the Administrator finally took the position on May 13, 1944, when he assumed to exercise that authority, that he would attempt to obtain favorable action upon his contention by litigation rather than by Congressional action, in spite of the obvious delay and expense involved in the litigation that was certain to follow. Such administrative construction of the Act has very little, if any, weight. The rule contended for by the Administrator is at its best no more than an aid in statutory con-

struction. "While it is useful at times in resolving statutory ambiguities, it does not mean that the prior construction has become so embedded in the law that only Congress can affect a change. * * * It gives way before changes in the prior rule or practice through exercise by the administrative agency of its continuing rule-making power." *Helvering v. Reynolds*, 313 U. S. 428, 432; *Helvering v. Wilshire Oil Company*, 308 U. S. 90, 100. In any event, such a rule, if it is to be applied in this case, supports the position of the appellee more strongly than the position of the Administrator. As pointed out above, shortly after the enactment of the Price Control Act the Supreme Court in the *Cudahy* case construed unfavorably to the Administrator's contention the statutory language now under consideration. With that interpretation definitely before it, Congress subsequently reenacted the Act on June 30, 1944, and June 30, 1945, without attempting to amend the language so as to give it a different meaning and effect.

The Administrator correctly argues that the above quoted provision from § 201 (a) of the Act unquestionably gives him the authority to delegate certain of "his functions and duties" under the Act. The language of the statute specifically so provides. Reference is made by him to *Bowles v. Griffin*, 151 Fed. (2d) 458, 5th Circuit, in which it was held that the Administrator could appoint a rent director for a defense area and delegate to him the authority to fix by orders maximum rents for housing accommodations therein, and to *Bowles v. Wheeler*, 152 Fed. (2d) 34, 9th Circuit, in which it was held that the Administrator had the authority

to delegate the suit-bringing function to any authorized representative. It is then contended that if certain functions and duties are delegable under the Act, and no differentiation is made by the Act between different functions and duties, it necessarily follows that all of his functions and duties, including the power to issue subpoenas, are delegable. The answer to that is that the Supreme Court in the *Cudahy* case had before it the same language and the same question and held that the statutory authority to delegate "his functions and duties" under the Act did not include the authority to delegate the subpoena power.

The Administrator also strenuously argues that his authority to delegate the subpoena power is to be inferred from the nature, character and extent of his duties, and that his administration and enforcement of the Act will be seriously handicapped unless such authority exists. This argument was also stressed by the dissenting opinion in the *Cudahy* case, but rejected by the majority opinion. We concede the existence and complexity of the multitudinous duties which the Price Administrator is

required to perform in order to successfully and effectively carry out the purposes of the Act. No doubt the authority to delegate the subpoena power would materially aid him in expeditiously performing those duties. Yet if we adhere to the rule that the subpoena power cannot be impliedly delegated, it is not a proper argument to be considered by this Court. It is a question of legislative policy, depending upon many various considerations, whether it is wise or unwise to give unlimited authority to an administrative officer to delegate the exercise of the subpoena power. As pointed out by the Supreme Court in the Cudahy case (pages 363, 364) such unlimited authority of an administrative officer "is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer," which is a cogent reason for granting such power "only to the responsible head of the agency." If such authority is necessary to make the administration and enforcement of the Act successful, Congress can at any time and in short order create such authority. The appellant's contention in this respect is sufficiently answered by the following closing words in the majority opinion in the Cudahy case:

"Nor can we assume, as the Government argues, that Congress is wholly without design in withholding the power in this case and granting it in others, or even if it had been, that it is any part of the judicial function to restore to the Act what Congress has taken out of it. Even though Congress has underestimated the burden which it has placed upon the Administrator, which is by no means clear, we think that the legislative record establishes that Congress has withheld from him authority to delegate the
34 exercise of the subpoena power, and that this precludes our restoring it by construction."

The Administrator refers us to the four following opinions of different Circuit Courts of Appeals, all involving the same issue as is now presented to us and sustaining his contentions: *Pinkus and Segal v. Porter*, decided May 2, 1946, 155 Fed. (2d) 90, 7th Circuit; *Raley v. Porter*, decided June 17, 1946, — Fed. (2d) —, U. S. Circuit Court of Appeals, District of Columbia; *Porter v. Gantner & Mattern Company*, decided June 24, 1946, — Fed. (2d) —, 9th Circuit; *Porter v. Murray*, decided June 28, 1946, — Fed. (2d) —, 1st Circuit. We recognize the weight of those opinions. It is sufficient to say here that they hold that the decision of the Supreme Court in the Cudahy Packing Company case is not controlling due to the differentiating features involved in the Emergency Price Control Act, as contended for by the Administrator and as pointed out hereinabove. In our view that the ruling in the Cudahy Packing Company case does control the present situation,

we necessarily have to disagree. We fail to find any of the four opinions referred to any real recognition of the broad rule of administrative law pronounced by the opinion in that case, namely, that the subpoena power conferred by legislation upon the head of an administrative agency is delegable by him "only when an authority to delegate is expressly granted." As stated above, we believe that fundamental rule controls our decision in the present case.

The order of the District Court is accordingly affirmed.

[Clerk's certificate to foregoing transcript omitted in printing.]

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Supreme Court of the United States

No. 583, October Term, 1946

Order allowing certiorari

Filed November 12, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the question whether the Emergency Price Control Act authorizes the Administrator to delegate to district directors authority to sign and issue subpoenas. The case is transferred to the summary docket and assigned for argument immediately following Nos. 483 and 512.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.